No. 82-1436

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CITY OF TORRANCE,
Appellant,

vs.

WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA;
STATE COMPENSATION INSURANCE FUND,
Appellees.

On Appeal From the Supreme Court of the State of California

MOTION TO DISMISS OF AFFIRM

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QUESTIONS PRESENTED

I

May the Legislature, pursuant to the plenary power granted it by the California Constitution to enact a complete system of workers' compensation, limit the period of liability in a cumulative injury case?

II

Is a workers' compensation insurance agreement impaired by a legislative enactment where the insuring agreement provides that the parties will be bound by the workers' compensation law of the State of California?

PARTIES TO THE PROCEEDING

The State Compensation Insurance Fund is one of the parties in the court below.

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STATEMENT OF FACTS

A. The State Statute Involved and the Nature of the Case

This action arises out of a workers' compensation claim and involves the issue of liability for an injury that occurred during City of Torrance's, appellant, period of self-insurance. The injured workers' benefits are not involved. At issue is whether the California Legislature can limit the period of liability in a cumulative trauma case and hold only those employers responsible who were on the risk during the last four years of hazardous exposure. The statute involved is Labor Code Section 5500.5, which provides under subsection (a):[1]

> "(a) Except as otherwise provided in Section 5500.6 which applies to household employees, liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1978, shall be limited to those employers who employed the employee during a period of four years immediately preceding either the date of injury, as determined pursuant to section 5412, or the last date on which the employee was employed in an occupation exposing him to the hazards of such occupational disease or cumulative injury, whichever occurs first. Commencing January 1, 1979, and thereafter on the first day of January for each of the next two years, the liability period for occupational disease or cumulative injury shall be decreased by one year so that liability is limited in the following manner:

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[1]Section 5500.5 is a comprehensive code section that deals with cumulative trauma and occupational disease injuries. It contains sub-sections (a) through (i) and provides a detailed format, including procedures for litigation. The sections identify the method of joinder of additional parties, subsequent procedures for contribution, apportionment and the period of accountable liability. Appellant's challenge is limited to the latter section, subsection (a).

For claims filed or asserted on or after:	The period shall be:
January 1, 1979	three years
January 1, 1980	two years
January 1, 1981 and thereafter	one year

If, based upon all the evidence presented, the appeals board or referee finds the existence of cumulative injury or occupational disease, liability for such cumulative injury or occupational disease shall not be apportioned to prior or subsequent years. . . ."

B. The California Workers' Compensation System

1. The Legislature established a competitive workers' compensation system

Article XIV, Section 4 (formerly Article XX, Section 21) of the California Constitution provides that the Legislature is "vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation . . ." The Article states that the Legislature is vested with the same power to provide "for full provision for adequate insurance coverage to pay or furnish compensation . . . and for regulating such insurance coverage in all its aspects, including the establishment and management of a State compensation insurance fund." The Article also empowers the Legislature to establish an administrative system to litigate workers' compensation cases to accomplish "substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character."[2]

In providing for a complete system of workers' compensation, the Legislature established a competitive, nonmonopolistic workers' compensation program, one which allows employers to seek workers' compensation coverage from the State Compensation Insurance Fund or other

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[2]Amendment adopted November 5, 1918.

carriers.[3] There are over 100 workers' compensation carriers competing with one another in California.

Public agencies are slightly restricted. They must purchase workers' compensation insurance from the State Compensation Insurance Fund or elect to become self-insured.[4] If public agencies become self-insured, they may contract with private carriers to administer and defend their claims. Public agencies are not bound to purchase other forms of insurance from the State Compensation Insurance Fund and may freely contract with other carriers for liability, automobile and fire insurance as well as other coverages. It is clear that appellant's brief exaggerates the role of the State Compensation Insurance Fund and its relation to public agencies. Furthermore, it is incorrect to state that California has established a "state monopoly for selling insurance to public agencies." App. Br. 1. There simply is no authority for the proposition that public agencies must buy *all* of their insurance from the State Compensation Insurance Fund or that they even have to be insured with appellee.

2. The State was not a party to the contracts at issue

It is incorrect to state that "the State of California (was) a party to the contracts at issue." App. Br. 13. Appellee's operating funds are separate and distinct from the State of California and its posture in this case is no different from that of any other insurance carrier.[5]

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[3]Labor Code Section 3211; 2 Larson, Workmen's Compensation Law Appendix A, Table 7; 2 Hanna, California Law of Employee Injuries and Workmen's Compensation (2d ed. 1979) (Section 1.05 [6] [c]).

[4]Insurance Code Section 11870, Labor Code Section 3700(c), 3702 et seq.

[5]The State Compensation Insurance Fund was established pursuant to the Boynton Act, Section 11770, Stats. 1913, Ch. 176 to provide immediate protection to California employers and employees, since there were no workers' compensation insurance carriers in existence when workers' compensation was introduced.

Appellee is a self-supporting insurance carrier that is financially distinct from the State of California and does not depend on general revenues from the State for any of its operations.[6] Appellee functions like a mutual insurance company, returning profits to its insureds in the form of dividends.[7] "The State Compensation Insurance Fund has compiled a long and imposing record of substantial dividend payments."[8]

In an attempt to show an economic dependence between the appellee and the State, appellant cites California Insurance Code Section 11773. App. Br. 5, fn. 3. This section provided the basis for an appropriation of one hundred thousand dollars "seed-money" to the appellee in 1913. No part of the appropriation was ever drawn from the State treasury and the whole sum was repaid with interest in 1921.[9] Even more significant is the fact that this section was repealed in 1979 and now reads, "The fund shall be organized as a public enterprise fund."[10]

Appellee is not only mandated to be "fairly competitive" with other workers' compensation carriers, but special legislative enactments distinguish appellee from state agencies and put it on an equal footing with all other compensation carriers.[11] Appellee is authorized to transact workers' com-

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[6]Insurance Code Section 11772; *Burum v. State Compensation Insurance Fund*, 30 Cal.2d 575 (1947); *Gilmore v. State Compensation Insurance Fund*, 23 Cal.App.2d 235 (1937); 2 Hanna, op. cit. supra (Section 20.01 [B]); Herlick, California Workers' Compensation Law Handbook, Second Edition, Volue 1, (Section 1.20).

[7]Insurance Code Section 11776.

[8]2 Hanna, op. cit. supra, (Section 1.05 [6] [c], fn. 18).

[9]2 Hanna, op. cit. supra, (Section 2.04 [2], fn. 4).

[10]Stats. 1982, Ch. 714, Section 305.

[11]Insurance Code Sections 1175, 11781; 2 Hanna, op. cit. supra, Section 20.01 [1] [b].

pensation insurance "to the same extent as any other insurer."[12] Appellee's assets provide the basis for its operation, i.e. payment of losses, expenses and dividends.[13] "The State is not liable beyond the assets of the State Compensation Insurance Fund for any obligation in connection therewith."[14] State taxes are paid through a premium tax, calculated on the same basis as with all other California workers' compensation insurers.[15] Appellee is allowed to invest its funds in the same manner as private carriers and is not bound by rules pertaining to state agencies.[16] Appellee is expressly exempted from California Government Code sections that apply to state agencies that deal with the expenditure of funds.[17] Appellee's real property is subject to taxation on the same basis as other private insurance carriers, on the rational that its property is not regarded as State property for purposes of taxation.[18] Finally, appellee is not subject to those provisions of the Government Code applicable to State agencies generally or collectively, except as to State Personnel Board rules governing employer-employee relations.[19]

In brief, appellee's financial status and insurance operations are separate and distinct from the State of California. Even in the event of insolvency, no State funds would be appropriated; as a member of the California Insurance Guarantee Association, appellee's obligations would be sat-

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[12]Insurance Code Section 11778.

[13]Insurance Code Section 11774.

[14]Insurance Code Section 11771.

[15]Revenue and Taxation Code Section 12203.

[16]Insurance Code Section 11797.

[17]Insurance Code Section 11793.

[18]19 ops. Cal. Atty. Gen. 249, 251 (1952).

[19]Insurance Code Section 11873.

isfied, like any other bankrupt member, from Association funds and not from the State coffers.[20]

There is a distinct advantage derived from such a system. Not only does appellee provide a permanent market for workers' compensation insurance at no cost to the public, but it functions as "a 'yardstick' for the industry by maintaining fair premium rates for employers and fair treatment for their injured employees."[21] An early report of the Industrial Accident Commission (precursor to the Workers' Compensation Appeals Board) "noted that the very purpose of creating the State Fund was to make impossible a private insurance monopoly."[22]

Thus, appellee's presence prevents a single carrier from dominating the market and establishing a monopoly.

C. The Industrial Injury Determined the Basis for Awarding Benefits and Imposing Liability

On March 12, 1978, Kenneth V. Atkinson, a fireman for the City of Torrence, appellant, died. His surviving dependent filed a death claim for workers' compensation benefits. The claim was based on the theory that the employee's death was due to cumulative trauma during the full time of his employment with appellant, 1956 to 1977. Section 5500.5 provided that only the last four years of injurious employment preceeding the date of injury would be considered in assessing liability. By virtue of this provision, appellant, which was permissibly uninsured, i.e. self-insured and had been since 1971, was held liable for the total death benefit.

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[20]Insurance Code Section 1067 et seq.

[21]2 Hanna, op. cit. supra, (Section 2.04 [2]); Herlick, op. cit. supra, (Section 1.20).

[22]Background Notes for Workers' Compensation Subcommittee Interim Hearing on the Subject of Reforming California Workers' Compensation Laws, Assembly Committee on Finance, Insurance and Commerce, Fall 1977, p. 297.

Prior to 1971, appellant was insured for workers' compensation with appellee. Appellant contends that the insurance agreements entered into between it and appellee provided for contribution and that appellee should pay a proportionate share of the award. The facts will demonstrate, however, that appellant is solely liable under the law that existed at the time of injury and that there was no impairment of contract.

The terms of the insurance agreements provided that when an injury occurs, benefits will be provided under the Workers' Compensation Laws of the State of California. Specifically, the charging paragraph, which created the obligations of the parties, stated that appellee agreed "to pay promptly and directly to any person entitled thereto *under the Workers' Compensation Laws* . . . , and as therein provided, any sums due for compensation . . . , to be directly aid primarily liable . . . to pay the compensation, if any, for which the (City) is liable . . . , and (to) be bound by and subject to the orders, findings, decisions or awards rendered against the (City) *under the Workers' Compensation Laws* . . ." (emphasis stated).

It is pertinent to note that appellant's Statement of the Case cites a portion of the above text and egregiously omits the phrase "under the Workers' Compensation Laws." App. Br. 2, 5, 15. Appellant selectively recites a segment of the insuring paragraph as evidence of the fact that it had a right of contribution. Appellee will demonstrate that the omitted language is essential because it establishes the rights and obligations of the contracting parties. Appellant's failure to include the phrase is compounded by its disinclination to discuss it. As appellee will later note, this provision, including the deleted phrase, was the basis for the California Supreme Court's decision.

The import of the contract language is readily apparent. The agreement clearly indicates it was the intent of the

parties to be bound by subsequent changes in the law. Furthermore, the language merely restates Insurance Code Sections 11651 and 11654, which establish workers' compensation law as essential provisions of every workers' compensation policy.

D. The Historical Development of Labor Code Section 5500.5

A brief comment on the historical development of Section 5500.5 is relevant. First enacted in 1951, Section 5500.5 provided a means whereby an injured worker could litigate a cumulative injury and the Workers' Compensation Appeals Board could resolve it expeditiously. It permitted the injured to elect to go to trial against one employer or carrier and recover the whole award, after which that employer or carrier could seek contribution from other responsible parties.

In 1973, the Legislature amended Section 5500.5 to limit the period of hazardous employment that could be held accountable in a cumulative injury case. This reform was deemed necessary for a variety of reasons. It would facilitate rate computation because statistics would be easier to gather. This in turn would be reflected in more accurate premiums charged California employers. Insurance reserves could be reduced, which in the case of appellee would increase the dividends distributed to its insureds. The enactment would ease the heavy burden of cases on the Workers' Compensation Appeals Board and expedite litigation. It would also provide a safer work environment because liability would be more closely tied to the last employer, who is best able to provide a safe place to work. After legislative hearings involving testimony from all parties in the workers' compensation industry, including public entities such as appellant, the Legislature chose to limit liability for continuous trauma injuries to five years immediately preceding the date of injury or last exposure.

Again in 1977, the legislature modified Section 5500.5 to provide for a stepped reduction to one year by 1981. Both the 1973 and the 1977 amendments provided for reduction in the period of liability, the only difference being that in 1973 the Act provided what is commonly known as "the single employer exception." This exception, contained in subsection (d), provided that the whole period of hazardous employment would be held responsible if an employee worked for more than five years with one employer. It was deleted in 1977.

The central theme of appellant's case is that the legislature should have retained the "single employer exception" when it amended the Act in 1977. Paradoxically, appellant concedes that it would be bound by subsequent legislative enactments increasing the level of benefits to injured workers and that no impairment of contract would occur but denies that the legislature could limit the period of liability in cumulative trauma cases for *all* employers. App. Br. 10. Stated differently, appellant contends that the United States Supreme Court should create an exception for it or declare the whole provision unconstitutional.

E. The Proceedings Below

Following an unfavorable decision at the administrative trial level, appellee petitioned to the Workers' Compensation Appeals Board, which in a three-panel decision unanimously overturned the ruling. The Board reasoned that the 1973 and 1977 amendments had the same objectives and that appellant's right of contribution was statutory and not based on common law.

Appellant appealed to the District Court of Appeal urging a reversal of the Board's decision on the ground that the contract was impaired because appellee was contractually obligated to pay a portion of the award. The District Court of Appeal unanimously rejected appellant's

contention, stating that "The policy, in substance, requires the insurer to pay what the law requires," and that "the possibility of changes in the applicable law has become party of the risk assumed by the compensation carrier and the self-insureds."

Appellant's appeal to the California Supreme Court was similarly rejected in a 6 to 1 decision. The Court found that the contract was not impaired because the parties agreed to be bound by the workers' compensation laws of the State of California.

Appellant's argument presented to the U.S. Supreme Court is a substantial departure from that taken in the lower courts. First, it represented in two oral arguments that its position did *not* depend on whether or not the State was a party to the contracts. Second, it did not make the claim that California established a State monopoly for selling insurance to public entities. In seven appellate briefs and over 170 pages of argument, including various petitions, appellant never used the word "monopoly" once.

ARGUMENT

I

Appellant's Contracts Are Not Impaired

The facts clearly demonstrate that the parties agreed to be bound by the workers' compensation laws of the State of California. It is undisputed that the loss manifested itself during appellant's period of self-insurance and that the law on the date of injury imposed the full responsibility on appellant. Appellant asks the court to *assume* an impairment, steming from an alleged lost economic advantage. To substantiate the claim of impairment, appellant refers to a *portion* of the insuring agreement, as if the deleted crucial language was of no significance. Yet, the omitted language was the very essence of the contract and the grounds on which the California Supreme Court based its decision. The

failure to come to terms with the contract language and the lower court's reasoning evidences the weakness and lack of substance of appellant's Jurisdictional Statement.

Appellant's contracts with appellee are still viable and enforceable for injuries that manifest themselves during the period of coverage that the contracts provide. Appellee remains liable for industrial injuries occurring during its coverage. In the case at bar, the injury occurred during appellant's coverage. Section 3208.1 provides that the date of injury for cumulative injuries shall be determined by Section 5412. Section 5412 establishes the date of injury in a cumulative trauma case as the date on which the employee *first* suffered disability.[23] Applying Section 5412 to the instant case, the date of injury occurred during appellant's coverage and the law in effect on *that date,* not the date the parties executed the agreement, governs. On the date of injury, Section 5500.5 limited liability to four years preceding the date of injury, all of which occurred during appellant's self-insurance coverage. However, had the date of injury occurred during appellee's period of coverage, appellee would have been responsible and the appropriate law applied. Thus, it is incorrect to state, as appellant does repeatedly, that the contracts were abrogated and that appellant had an unqualified contractual right to seek reimbursement. Consistent with its refusal to cite or discuss the full text of the contract, appellant did not attempt to define the date of injury or the application of Sections 3208.1 and 5412 to the facts.

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[23]"The date of injury in case of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment."

A. Workers' Compensation Law Is Subject to Change

Appellant confuses disability with exposure. This confusion is apparent in that appellant speaks of the total abrogation of appellee to pay for workers' compensation injuries on one hand and at the same time concedes that it "sought contribution" from appellee. App. Br. 12, 8. It is not the injured's recovery that is involved. All benefits have been paid to the applicant. The central issue of appellant's liability and its obligation to be bound under the laws of the State of California.

Appellant had no right to assume that the law would remain fixed. Since the Boynton Act, the Legislature has not hesitated to amend the Workers' Compensation Law and, with the exception of 1921, new laws have kept pace with changing and developing needs in the workers' compensation field. The dynamic nature of workers' compensation law stems directly from the constitutional mandate. One must ask, how effectively could the Legislature fulfill its obligation if the law remained static? As industry creates new manufacturing techniques and processes giving rise to new risks and injuries, can the Legislature meet its commitment by remaining inert?

The judicial system has, and is, a substantial force in developing workers' compensation laws. From its inception when the California Supreme Court reviewed the California Compensation Act and declared it constitutional, the courts through statutory interpretation have had an impact on rights and obligations and at times have found them to be different from what the contracting parties originally believed them to be. Yet, these decisions have withstood constitutional challenges. Section 5500.5 is no exception and owes its origin to the decisional rule announced in *Colonial Insurance Co. v. I.A.C.*,[24] which the Legislature adopted in

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[24]29 Cal.2d 79, 179 P.2d 884 (1946).

1951. Subsequent constitutional challenges were raised in a number of cases involving Section 5500.5 and rejected.[25] *Argonaut Mining Co. v. I.A.C.*, in particular, rejected a constitutional challenge based on impairment of contract.[26] Judicial interpretations in *Fireman's Fund Indemnity Co. v. I.A.C.* and *Beveridge v. I.A.C.* expanded the original language to include injuries due to micro-trauma.[27] In *Harrison v. WCAB*, the courts upheld the 1973 amendments to Section 5500.5, concluding that they were consistent with the constitutional imperative.[28]

When appellant voluntarily elected to become self-insured in 1971, it did so against a background of legislative review in the workers' compensation field.[29] A significant number of states enacted reform legislation following intensive investigative hearings. New York, Oregon, Maryland, Idaho and Pennsylvania all adopted reform legislation after studies and hearings in the sixties.[30] California, in particular, invited improvements "directed toward reducing litigation and separating the administrative and adjudicatory functions," following a 1965 report of the Workers' Compensation Study Commission.[31] It is apparent that the reform climate that preceded appellant's decision to become self-insured in 1971 was a sufficient reason

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[25]*Subsequent Inj. Fund v. I.A.C. (Koski)* 49 Cal.2d 354, 317 P.2d 8 (1957); *Argonaut Mining Co. v. I.A.C.*, 104 Cal.App.2d 27, 230 P.2d 637 (1951); *Pacific Employers v. I.A.C.*, 219 Cal.App.2d 634, 33 Cal.Rptr. 422 (1963).

[26]Ibid., 104 Cal.App.2d 27, 230 P.2d 637 (1951).

[27]39 Cal.2d 831, 250 P.2d 148 (1952); 175 Cal.App.2d 592, 346 P.2d 545 (1959).

[28]44 Cal.App.3d 197, 118 Cal.Rptr. 508 (1974).

[29]The Report of the National Commission on State Workers' Compensation Laws, (July 1972), Ch. 7 "A Time for Reform."

[30]id., p. 121-122.

[31]id., p. 121; 2 Hanna, op. cit. supra, Section 101 [3]; Stats. 1965, Ch. 1513, Section 214.

in itself for anticipating changes in workers' compensation laws that might follow, particularly in the areas of improving and expediting the litigation process.

B. The United States Supreme Court Has Held That Subsequent Legislative Enactments Do Not Impair Contracts Which Incorporate Changes in the Law

In *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, this Court found that a contract was not impaired by a subsequent state act that imposed a restriction on a contract provision dealing with the price of natural gas.[32] The Court reasoned that state price restrictions were foreseeable because supervision of the industry was "extensive and intrusive," and the contract price clauses "were structured against the background of regulated gas prices." Furthermore, "the contracts expressly recognize the existence of extensive regulation by providing that any contractual terms are subject to relevant present and future state and federal law."

The principles discussed in *Energy Reserves,* supra, are applicable to the instant case. The insurance agreement recognized that the parties would be bound by state law and workers' compensation is a field where legislative enactments and judicial decisions are extensive and intrinsic in the industry, the constitutional mandate and Insurance Code Sections 11650-11656 serving as the basis for all authority. Appellant had just as much opportunity to foresee changes in the law as the energy company did in *Energy Reserves,* given the legislative history of Section 5500.5, the long history of statutory and judicial presence in workers' compensation and the concern expressed by state and federal governments regarding expeditious delivery of benefits to injured workers. In addition, the rule imposing liability on the employer with the last injurious

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[32] .... U.S. ...., 74 L.Ed.2d 569, 582-583 (1983).

exposure was applied in Longshoremen and Harbor Workers' cases for 16 years before appellant became self-insured.[33] Similar rules achieving the same result as Section 5500.5 were already evident in other states.[34]

In *U.S. Mortgage v. Matthews,* the U.S. Supreme Court reversed a finding that a state statute impaired foreclosure rights on the ground that the contract itself recognized that these rights might be effected by subsequent legislation.[35] The mortgage agreement provided a sale of property according to certain statutes "or any amendments or additions thereto." Subsequent legislation limited the lender's rights to foreclose or default. The U.S. Supreme Court reversed a lower court finding of impairment of contract, noting that the contract language "embraced the amendments and additions" to the statute stated in the mortgage agreement. The workers' compensation agreement between appellant and appellee indicated an intention of all the parties to incorporate California law when a claim was presented and expressly recognized that the parties would be bound by subsequent changes in the law.

II

Labor Code Section 5500.5 is Reasonably Related to Legitimate State Goals

A. The 1977 Amendments Had a Legitimate Objective

Appellant incorrectly characterizes Section 5500.5 as having no legitimate state purpose except "the abrogation of State Fund's financial obligations to City and similar employers . . ." App. Br. 19. Appellee will demonstrate that the section has legitimate state goals that are con-

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[33]*Travelers Insurance Co. v. Cardillo,* 225 F.2d 137 (2nd Cir. 1955); 4 Larson, op. cit. supra, Sections 95.12, 95.21, 95.25.

[34]Post, fn. 41, page 17 for a discussion of other states applying a similar rule.

[35]293 U.S. 232.

sistent with the Legislature's plenary power under Article XIV, Section 4 of the California Constitution.

It is evident that the section does not refer to appellee and applies to the whole workers' compensation industry in California. Appellant recites the "single employer exception" contained in the 1973 amendments but dismisses the main provisions as "not pertinent." App. Br. 7. Yet, both the 1973 and 1977 amendments limited the period of legal responsibility for cumulative trauma injuries. A reading of both sections fails to disclose a legislative intent to confer a benefit on appellee. Appellant's attack on the 1977 amendments is an attempt to have the courts obliterate the statute and formulate a plan whose history proved unworkable and destructive.

Preceding the statutory amendments to Section 5500.5, Congress enacted the "Occupational Safety and Health Act of 1970," which established a National Commission on State Workmen's Compensation Law.[36] The purpose of this act was to study workers' compensation laws to determine "if such laws provide an adequate, prompt and equitable system of compensation."[37] A report was prepared and submitted to the President and Congress in 1972. One of the objectives for a modern workers' compensation program was "an effective system for delivery of the benefits and services," so that the goals of workers' compensation laws could be "met comprehensively and efficiently."[38] Excessive litigation was one aspect interfering with a prompt delivery system.[39] The study indicated the need for certain minimum reforms, and it was evident to the states that a

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[36]84 Stat. 1590.

[37]The Report of the National Commission on State Workmen's Compensation Laws, p. 150.

[38]Id., p. 15.

[39]Id., pp. 100, 119.

uniform federal workers' compensation law was a possibility.[40]

In 1973, California amended Section 5500.5, bringing California in line with a substantial number of other states and the federal courts.[41] Since the legislation reduced the

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[40]Id. Ch. 7.

[41]*Traveler's Insurance Co. v. Cardillo*, op. cit, supra; *General Dynamics Corp. v. BRB*, 265 F. 208 (2nd CCA 1977); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, (9th CCA 1979), *cert. den.*; Proceedings of Assembly Committee on Finance, Insurance and Commerce into Problems of Insuring Payments of Compensation for Cumulative Occupational Injurious Interim Hearings, (January 12 and 19, 1977) (hereafter "1977 Assembly Committee Hearings.") Pages 399-401 provided the Committee with the following analysis, showing imposition of liability on the last employer or carrier in 33 states:

"States which limit liability to the last day of employment:

1. Illinois—Chapter 48, Section 172.36 (d)
2. Indiana—Section 22-3-7-33
3. Wisconsin—Section 102.01 (f)

II. States which limit liability to the last employer where the employee was injuriously exposed and, either by statute or case law, further limit liability to the last carrier on the risk with said employer:

(A) By statute

1. Vermont—Section 1008
2. Arkansas—Section 81-1314 (b)
3. Colorado—Section 8-51-112
4. Florida—Section 440.151 (5)
5. Georgia—Section 114-809
6. Kansas—Section 44-5a06 (Chapter 203, Laws 1974)
7. Maine—Title 39, Section 186
8. Maryland—Article 101, Section 23 (b)
9. North Carolina—Section 97-57
10. Oklahoma—Title 85, Section 11 (3)
11. Tennessee—Section 50-1106
12. Virginia—Section 65.1-50

(B) By Case Law

1. Arizona—State Comp. Fund v. Joe, 543 R. 2d. 790

period of accountable liability, it also limited the number of employers and insurers involved in the litigation process. The benefits flowing from such legislation were consistent with the constitutional requirements to provide a complete system of workers' compensation, including providing for and regulating adequate insurance coverage. Not only did the reduced period allow for more accurate underwriting and premium calculations but it also relieved the litigation logjam that was effectively denying benefits to injured

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2. South Carolina—Glenn v. Columbia Silica, 112 S.E.2d 711

3. Pennsylvania—Gaydosh v. Richmond Radiator, 63 A.2d 502

4. Oregon—Davidson Baking v. Industrial Indemnity, 532 P.2d 810

5. New Jersey—Marko v. Barnett Foundry, 147 A.2d 579

III. States which limit liability to the last employer where the employee was injuriously exposed. No statutory or decisional clarification as to carriers during the employment:

1. Montana—Section 92-1310
2. Idaho—Section 72-102 (17)
3. Texas—Section 8306, Part 1, Section 24
4. New Mexico—Section 59-11-11
5. Missouri—Section 287.063 (2)
6. Alabama—Title 26, Chapter 5, Article 2c., Section 313 (41)
7. Iowa—Title V, Section 85 A. 10
8. South Dakota—Section 62-8-15

IV. States which limit liability to the last employer where the employee was injuriously exposed, including all carriers who insured the risk during the period of employment.

1. Utah—Statute 35-2-14, Case—State Insurance Fund v. Industrial Commission, 399, P.2d 208

V. States which assess liability on the carrier which is on the risk at the time the employee actually suffers disability:

1. Delaware—Alloy Surfaces Co. v. Cicamore, 221 A.2d 480
2. Massachusetts—see 100 CJS, Section 373, fn. 87
3. Minnesota—Bituminous Car. Corp. v. Hartford, 167 N.W.2d 741
4. Alaska—Lloyds v. Alaska Indus. Bd., 160 F.Supp. 248

workers. Thus, the amendments were consistent with the objectives of the National Commission on State Workers' Compensation Laws, i.e. to provide for an effective delivery system of benefits and services. "The purpose of these amendments was to provide greater certainty to insurers in anticipating costs and necessary reserves, to simplify the proceedings by reducing number of employers and insurers required to be joined as defendants and to reduce the burden placed on the entire system by the former procedures."[42] The benefits would also inure to self-insureds.[43] The amendments provided immediate relief from a "procedural morass" that was impeding litigation to the degree that the delay in providing benefits was "in violation of the constitutional mandate that workers' compansation be determined expeditiously."[44] "Forces ordinarily opposed to one another, in practical effect, joined to encourage passage of legislation which was obviously designed to ameliorate the pressing problems that have arisen under the old statutory scheme."[45]

In 1977, the Legislature further modified Section 5500.5 to accomplish the valid objectives begun in 1973. In view of the legislative history surrounding the passage of these amendments and the judicial decisions analyzing the legislative process, the purpose of the statute was to achieve legitimate goals consistent with the constitutional obligation to provide a complete workers' compensation system. Appellant cannot substantiate its broad, unfounded charge that the statute had a limited, narrow purpose, to benefit appellee.

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[42]*Flesher v. WCAB*, 23 Cal.3d 322, 328; 152 Cal.Rptr. 451 (1979).

[43]1977 Assembly Committee Hearings, op. cit. supra, p.69.

[44]*Harrison v. WCAB*, 44 C.A.3d 197, 205; 118 Cal.Rptr. 508 (1974); 1977 Assembly Committee Hearings, op. cit. supra, p.55, testimony of Melvin A. Witt, Chairman of California Workers' Compensation Appeals Board.

[45]*Harrison v. WCAB*, Ibid

B. The State May Exercise Its Police Power to Accomplish a Legitimate Goal

The state may exercise "its essential reserve power to protect the vital interests of its people."[46] In *El Paso v. Simmons,* the U.S. Supreme Court upheld a state statute that restricted a former landowner's right to reinstitute title and found no impairment of contract.[47] Previous to the imposition of a 5 year limitation from the date of forefeiture, Texas had no restriction, and a former landowner could institute recovery proceedings for as far back as when title was first acquired, which in the case at bar was over 40 years. The Court noted that the "massive litigation to which this gave rise" was expensive and interfered with land use. In approving the statute, the U.S. Supreme Court noted that the purpose of the statute was to restore stability and integrity to land titles, allowing the State of Texas to conduct the administration of land titles in a business like manner.

In the present case, as in *El Paso,* the Legislature had a vital interest to protect, the integrity of the workers' compensation system, and after legislative hearings, adopted a solution that met with the approval of "forces ordinarily opposed." Appellant seeks to resurrect a statutory scheme that these forces opposed, one that gave rise to a "procedural morass."[48] Where the legislative proceedings reflect an empiric process, following legislative hearings and analysis that involves consideration of future benefits and burdens and is based on the opinion and views of a diversity of interests, it cannot be said that the resultant law should be rejected as an impairment of contract on the ground that the legislature acted arbitrarily.[49]

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[46]*Faitoute Iron and Steel Co. v. City of Asbury Park,* 316 U.S. 502 (1941).

[47]379 U.S. 497 (1965).

[48]*Harrison v. WCAB,* op. cit. supra, p.205.

[49]*East New York Savings Bank v. Hahn,* 326 U.S. 230 (1945).

In a related matter, the U.S. Supreme Court considered the constitutionality of the Black Lung Benefits Act of 1972 and, in particular, certain statutory presumptions.[50] Although the charge of unconstitutionality was based on due process arguments, the case is appropriate because it deals with workers' compensation and the judicial analysis of a legislative program that attempts to achieve substantial fairness for all employers and at the same time institute a benefit program for injured workers. The Court noted that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. (citations) And this Court long ago upheld against due process attack the competence of Congress to allocate the interlocking economic rights and duties of employers and employees upon workmen's compensation principles analogous to those enacted here, regardless of contravening arrangements between employer and employee."[51] Rejecting a claim that present employers should not be held responsible for former employees' disabilities because the liability was unexpected, the Court stated, "But our cases are clear that legislation readjusting rights and burdens is not unlawful because it upsets otherwise settled expectations."[52] Responding to the contention that the law was unfair because present employers suffered the full burden of compensation while early operators were excluded from payment, the Court stated, "it is for Congress to choose" and "We are unwilling to assess the wisdom of Congress' chosen scheme for examining the degree to which the 'cost savings' employed by operators in the pre-enactment

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[50]*Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

[51]Id., p.766.

[52]Id., p.767.

period produced 'excess' profits, or the degree to which the retrospective liability imposed on the early operators can now be passed on to the consumer."[53]

Appellant's argument is substantially the same as the coal miner operator's arguments in *Usury*. In an attempt to demonstrate unreasonableness, it relies on the unfounded claim that the sole basis for the legislation was to benefit the appellee. In order to bolster this contention it claims the State was a party and that its coffers will be unjustly enriched. With respect to the latter, the financial relationship and daily operation of appellee's business is separate and distinct from the State. Appellant's extra-record arguments regarding reserves and finances have no bearing on the case, since these funds do not go to the State but are returned as dividends to appellee's policyholders, many of whom are insured governmental entities. Although appellant seeks to show a windfall profit by citing the premiums it paid, it does not state that during the period of its insurance coverage with appellee it received the benefit of dividends, coverage and complete insurance services.

Appellant readily concedes that the Legislature can initiate changes that impose substantial economic burdens without impairing any agreements between it and appellee. App. Br. 19. Since 1971 when petitioners elected to be self-insured, maximum temporary disability indemnity increased from $70 a week to $196.[54] The maximum death benefit increased from $55,00 to $85,000.[55] All of the increases imposed a substantial economic burden on the parties, perhaps even greater than the figures that appellant cites, yet it does not claim an impairment. This patent inconsistency is demonstrated by the fact that the duties and obligations all stem from the same agreement, one in

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[53]Id., p.768.

[54]Labor Code Sections 4453, 4453.1, 4469.

[55]Labor Code Section 4702.

which the parties agreed to be bound by the workers' compensation law. It also demonstrates the fallacy of assuming an impairment from a supposed economic disadvantage.

The issue is whether or not the Legislature exercised its plenary power in a reasonable fashion for a legitimate public purpose, not whether or not the appellant suffered a detriment. The contract clause is not impaired by "legislation adjusting the rights and responsibilities of contracting parties upon reasonable conditions and of a character appropriate to the public purpose justifying its adoptions."[56]

Appellant also benefits from the Act by virtue of the fact that it can calculate reserves and gather statistical data more easily. On the basis of this information, it can predict losses and adjust reserves more accurately, just as other insurance carriers and self-insureds can do. Of course, appellant is not encapsulated in its present mode of self-insurance. Appellant can simply elect to become insured with appellee.

Thus, appellant's plea for relief ignores the present and potential benefits that it also enjoys from the legislation.

Appellant also disregards the benefits that the injured worker will derive from a prompt and efficient delivery system. Imposing liability on the last employer provides the incentive for that entity or person to provide a safe place to work; since the last employer is the best position to provide a safe work environment, it is reasonable that the risk of loss should rest with that employer, who is obligated to provide a safe place to work by virtue of Labor Code §§ 6400 through 6404.

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[56] *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977).

C. The Claimed Impairment Is Insubstantial

Although the facts do not demonstrate an impairment, it is appropriate to respond to appellant's authorities dealing with the legitimacy of the legislation when an impairment is found.

Before doing so, however, appellee wishes to state that appellant abandoned the position that appellee and the State of California were one and the same. Appellant represented to the lower courts that for purpose of its argument, appellee was the same as any other insurance carrier and its legal position did not depend upon appellee's relationship to the State of California. Appellee points this out for two reasons: first, this representation made to the lower court explains why the decisions did not discuss this aspect to the case; second, it demonstrates the lack of substance of the Jurisdictional Statement.

Appellant's claim of impairment must be put in perspective. The legislation affects a small percentage of workers' compensation claims. In 1977, the Chairman of the Workers' Compensation Appeals Board testified that "The percentage of cumulative injury claims to all new claims filed before the Board is approximately 12½%."[57] The real effect of the act, however, may be on substantially fewer cumulative injuries than 12½%. For instance, with the passage of time fewer and fewer workers would have had employment pre-dating 1971, and appellant would have eventually had to assume all responsibility, regardless of the amendment. The elimination of the "single-employer exception" merely accelerated what would have occurred in any event. In addition, as longstanding employees leave appellant's employment to work elsewhere, that prospective employer assumes

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[57] 1977 Assembly Hearings, op. cit. supra, p.58.

what ordinarily would have been appellant's liability, should those employees initiate cumulative trauma claims.[58]

D. Appellant's Authorities Are Distinguishable

Appellee believes that the code sections and the authorities cited in appellee's Statement of Facts amply demonstrate that the State of California is not a party and that appellee is as much a private party to the insurance agreements as any other carrier. The present case is clearly distinguishable from *Allied Structural Steel Co. v. Spannaus* and *U.S. Trust Co. of New York v. State of New Jersey,* relied on by appellant.[59] Both cases deal with the legislative impairment of common law rights and do not deal with workers' compensation or rights arising out of statute.

In *U.S. Trust of New York v. State of New Jersey,* the State sought to undermine the security of its bonds by introducing legislation which would repeal certain specific covenants between the State and bondholders. In the instant case, the state is not a party, and the legislation does not attempt to repeal any covenant in any agreement but merely recites the period of employment that is accountable in a cumulative trauma case, a significant difference from *U.S. Trust of New York.*

In *Allied Structural Steel Company v. Spannaus,* the act dealt with pension rights and did not pertain to a broad general economic or social problem or attempt to

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[58]"The insurance industry formed these amendments and reasoned that the total burdens and benefits upon employers and insurers would more or less even out, for which they might be required to assume a longer liability in some cases, they would also be absolved of liability in other cases." *Flesher v. WCAB,* op. cit. supra, p. 328.

[59]*Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234 (1978); *U.S. Trust Co. of New York v. State of New Jersey,* 431 U.S. 1 (1977).

legislate in an area already subject to state regulation at the time the contract was executed. Appellee contends that the legislative history of workers' compensation law in California, and in particular Labor Code Section 5500.5, amply refutes the argument that the amendments did not deal with a broad social purpose in an area where the Legislature previously acted.

Citing *Home Building & Loan Association v. Blaisdell,* petitioner decrys the legislation on the ground that there was no emergency.[60] However, the presence or absence of an emergency is not dispositive of whether or not there is an impairment. Although an emergency may serve as the occasion for the exercise of the police power, it does not create it and the absence of one does not ipso facto indicate an impairment. *Viex v. South Ward Association* so held.[61]

Where, as in the instant case, the legislation is seeking to provide a remedy in a field where the Legislature is vested with plenary power and is mandated to the act, it cannot be said that the legislation performed in the absence of an emergency is invalid as offensive to the contract clause. However, appellee does not concede that there was no emergency, only that the presence of one is not essential to the case at bar.[62]

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[60]290 U.S. 398 (1934).

[61]310 U.S. 32, 38-39.

[62]*Flesher v. WCAB* and *Harrison v. WCAB,* op. cit. supra, describe conditions that indicate the need for expeditious legislation.

CONCLUSION

The 1977 amendments to Labor Code Section 5500.5 were the result of legislative hearings that considered the opinions of diverse interests in the workers' compensation field. The single most persuasive argument against the claim that the legislation was solely to confer a benefit on appellee is that those opposing parties were able to agree on amendments that restored stability and integrity to an industry that was floundering. The fact that a similar rule is followed in other jurisdictions, including the federal system, reinforces the constitutional legitimacy of the statute. Appellant's entire argument ignores the national trend, the legislative hearings and the state of the industry when the amendments were considered. Finally, the State of California derived no economic advantage from the legislation and the contention that a strict standard of review is required is inapplicable.

Appellee respectfully submits that the question upon which this cause depends is so insubstantial as not to need further argument, and appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in this case by the California Supreme Court.

Respectfully submitted,

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State Compensation
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